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IN THE

Supreme Court of the United States

October Term, 1959

No. 606

RICHFIELD OIL CORPORATION,

Petitioner,

vs.

KARSEAL CORPORATION.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM W. ALSUP,
WARREN M. CHRISTOPHER,
433 South Spring Street,
Los Angeles 13, California,
WILLIAM J. DE MARTINI,
555 South Flower Street,
Los Angeles 17, California,
Attorneys for Petitioner.

Of Counsel:
O'MELVENY & MYERS.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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RICHFIELD OIL CORPORATION,

Petitioner,

vs.

KARSEAL CORPORATION.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Richfield Oil Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on October 13, 1959.

Opinions Below.

The District Court did not write an opinion. The opinion of the Court of Appeals, which is printed in Appendix A hereto, *infra* pp. 1-37, is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 13, 1959. R. 1354; Appendix A, *infra*, p. 38. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

1. Where the trial court unquestionably is aware of the ground of objection to a jury instruction and there has been a long colloquy between court and counsel concerning the legal question underlying the objection, does failure to reiterate the ground when making the objection result in a waiver thereof under Rule 51 of the Federal Rules of Civil Procedure?

2. Where the trial court in a private antitrust action for treble damages erroneously instructs the jury that the findings in a prior government antitrust decree are made conclusive by Section 5 of the Clayton Act and cannot be controverted, is the error prejudicial?

Statutes Involved.

Rule 51 of the Federal Rules of Civil Procedure reads as follows:

"INSTRUCTION TO JURY: OBJECTION

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Section 5 of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 16(a), reads as follows:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . ."

Statement.

This action was brought by respondent for treble damages allegedly resulting from petitioner's violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, and Section 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14. Respondent Karseal Corporation is a manufacturer of an automobile wax polish having the trade name "Wax Seal." Petitioner Richfield Oil Corporation is a manufacturer and distributor of gasoline and other petroleum products in six western states. The essence of the complaint was that respondent's sales of "Wax Seal" were hindered by the allegedly illegal agreements and understandings between petitioner and independent service station operators selling Richfield petroleum products. R. 3-19.

Respondent's action was premised upon the decree in an earlier civil antitrust action brought by the United States against Richfield Oil Corporation. *United States v. Richfield Oil Corporation* 99 F. Supp. 280 (S. D. Cal. 1951), aff'd *per curiam*, 343 U. S. 922. That decree, which was

introduced into evidence in the instant case, determined that Richfield and certain independent service station operators selling Richfield petroleum products had entered into agreements and understandings which unreasonably restrained trade and commerce, substantially lessened competition, and tended to create a monopoly in the sale and distribution of automotive "accessories." R. 19-27; 129. Under the decree, the term "accessories" includes "automobile waxes and polishes". Respondent Karseal's waxes and polishes are, however, not expressly named in the decree.

In the course of the trial, the court and counsel engaged in an extensive colloquy regarding the effect to be given to the earlier decree against Richfield. R. 406-422. The trial court took the position that Section 5 of the Clayton Act prevented petitioner from controverting the finding in the decree that there had been an illegal restraint of trade with respect to waxes and polishes. Counsel for petitioner, on the other hand, contended that the provision of Section 5 making the decree *prima facie* evidence did not prevent petitioner from challenging, in the treble damage action, the findings contained in the prior decree.* Moreover, petitioner requested the following instruction setting forth its position on the effect of the decree:

> "The decree in the prior government case, to which I have referred, is only prima facie evidence with respect to certain matters. Prima facie evidence is

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*Counsel for petitioner stated: "Now, it is my understanding, your Honor, that that decree which was entered and which we are certainly not challenging in any way as a decree, is prima facie evidence only in this case however, and that we have a right to ask the jury to find that as to wax polishes there was no restraint despite the decree." R. 407.

such as to be sufficient to establish a fact unless it is rebutted by other evidence. If there is other evidence controverting the fact, you are required to make your own determination of that fact by weighing all of the evidence which pertains to it." R. 44.

Prior to final argument, however, the trial judge informed counsel that he intended to instruct the jury that the provision of the decree pertaining to the existence of restrictive practices "cannot be controverted". R. 1231; see R. 1235. In a colloquy concerning the amount of time which would be necessary to consider the objections to the court's instructions, the court addressed the following comment to counsel for petitioner:

"I know what those [petitioner's objections] are going to be, on your theory of prima facie, but I absolutely think I am right. If the Congress had stopped with the word 'prima facie,' then there would be some validity to the argument, but they went on to define it, so 'prima facie' there does not mean that. If it did, then we would be retrying the other case." R. 1242-1243.

Accordingly, the trial court instructed the jury, with respect to the effect of the decree, as follows:

"The ordinary meaning of the phrase '*prima facie* evidence' is this; 'Prima facie evidence' of a fact is such evidence as, in the judgment of the law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.

"But in this case the phrase 'prima facie' has a different meaning. This arises from the fact that the section read to you uses the word 'estoppel.'" R. 1256.

"When the plaintiff uses the decree to prove that restrictions applied to waxes and polishes, the defendant cannot controvert the general proposition that such restrictions existed. For that matter is what we call res judicata. He is 'estopped' to challenge the general fact. But he may still show that the restrictions were not enforced against the plaintiff's product and that, for this reason, the plaintiff suffered no damage." R. 1257.

Before submitting the case to the jury, the court afforded counsel an opportunity to present objections to the instructions outside the hearing of the jury. After a discussion concerning the court's inadvertent use of the term "gross profits", the following colloquy took place:

"Mr. Alsup [one of petitioner's counsel]: The only objection we would have, then, would be to give our No. 14 as to the 'prima facie.'

"The Court: I think you are absolutely wrong on that. I stake my entire case on that.

"Mr. DeMartini [one of petitioner's counsel]: We will specifically except to that, your Honor.

"The Court: I know. That exception will be noted. . . ." R. 1273-1274.

"Mr. DeMartini: Your Honor, just one further point, if we may clear up this objection. We have excepted to the failure to give our instruction No. 14, and we, of course, except to the giving of the instruction on prima facie, as given by your Honor.

"The Court: That is right." R. 1274.*

The jury returned a verdict of $7,900.00 for respondent. R. 85. Judgment was entered for treble damages in

*The instructions to the jury are set forth in full at R. 1243-1268.

the amount of $23,700.00, plus $7,500.00 attorneys' fees and $424.07 costs. R. 86, 115-117.

On appeal, the Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals recognized that the trial court's instruction on the conclusive effect of the prior decree was erroneous and not supported by any authority. Appendix A, *infra*, pp. 25-34. The court, however, raising the question *sua sponte*, held that petitioner's objection to the erroneous instruction had been waived by failure to state the ground of the objection at the time it was made. The Court of Appeals reached this conclusion despite its recognition that the trial judge knew petitioner's position on the defective instruction and that it would have been a "difficult task" for petitioner "to have caused the Court to change its previously announced position." Appendix A, *infra*, pp. 23-24. The Court of Appeals also held, as an alternative ground, that the erroneous instruction was not prejudicial "in view of other instructions by the court and the scope of the issues left to the jury." Appendix A, *infra*, pp. 36-37.

Reasons for Granting the Writ.

The Court of Appeals' decision represents a significant retreat from the principle that substance, not form, is controlling in determining the efficacy of an objection. The court below has held that even though the trial court was fully aware of the ground of petitioner's objection to an erroneous instruction, petitioner's failure to restate that ground when making the objection resulted in a waiver of the objection. This holding, as we shall show, is in conflict with a series of Court of Appeals' decisions from other circuits and is plainly wrong. Moreover, it is equally clear that the defective instruction was prejudicial to petitioner.

I.

The Holding Below That a Waiver Took Place Is in Conflict With Decisions From Other Circuits and Is Clearly Wrong.

A. Early in the trial of this treble damage action, an extended colloquy between the court and counsel highlighted the opposing contentions concerning the effect in this case of the earlier antitrust decree against petitioner. R. 406-422.* The court and counsel for respondent took the position that under Section 5 of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 16, the finding of the earlier decree that there was an illegal restraint of trade as to waxes and polishes was conclusive and could not be controverted in this action. R. 407-420. Counsel for petitioner, on the other hand, contended that the finding of the earlier decree was only *prima facie* evidence which petitioner could seek to overcome by evidence to the contrary. R. 407-420.

Petitioner proposed an instruction based upon its contention as to the *prima facie* effect of the earlier decree [R. 44], but the trial judge informed counsel that he intended to instruct the jury that the provisions of this earlier decree could not be controverted. R. 1231, 1235. Before hearing petitioner's objections to the instructions, the trial judge remarked, "I know what those are going to be, on your theory of prima facie, but I absolutely think I am right." R. 1242. Then, when counsel for petitioner formally objected to the instruction, the court immediately replied, "I think you are absolutely wrong on that." R. 1273. Thereafter, co-counsel for petitioner stated that he wished specifically to except to the instruction, and the

*The decree was rendered in *United States v. Richfield Oil Corporation*, 99 F. Supp. 280 (S. D. Calif. 1951), aff'd, 343 U. S. 922.

court responded, "I know. That exception will be noted." R. 1274. In addition, co-counsel for petitioner reminded the trial court that petitioner excepted to the failure to give its instruction No. 14 on the effect of the prior decree. R. 1274. Thus, as the Court of Appeals conceded, Appendix A, *infra*, p. 23, the record emphatically shows that the trial court was fully informed as to the ground of petitioner's objection to the erroneous instruction.

B. The holding of waiver in these circumstances, where the trial judge unquestionably was aware of the nature and ground of the objection, is in conflict with a series of Court of Appeals' decisions construing Rule 51. In *Williams v. Powers*, 135 F. 2d 153 (6th Cir. 1943), the court approved a brief objection which contained no statement of the grounds of objection, saying:

> "Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient." (P. 156.)

The *Williams* case followed *Sweeney v. United Feature Syndicate*, 129 F. 2d 904 (2nd Cir. 1942), which is also in conflict with the decision below. In *Sweeney*, the court held that failure to except to a refusal to give a requested instruction did not result in a waiver because earlier in the trial, "there was a full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law." 129 F. 2d at 906.

More recent decisions under Rule 51 are likewise contrary to the holding below. In *United States v. General Motors*, 226 F. 2d 745, 750 (3rd Cir. 1955), the court held that the failure of a party to "reiterate its position" subsequent to the charge by the court did not result in a waiver of objections to instructions where the court had been fully apprised of the objections at an earlier time. And in *City of Knoxville v. Bailey*, 222 F. 2d 520 (6th Cir. 1955), the court characterized as "hypertechnical" a waiver contention where the trial judge had (as he did in the instant case) specifically acknowledged and noted the objection.*

C. The principle laid down in Second, Third, and Sixth Circuit decisions involving Rule 51 is plainly correct. No useful purpose can be served by requiring a restatement of the grounds of an objection where they have been made abundantly clear to the court by earlier discussion. The purpose of allowing the court an opportunity to correct its instruction is fully achieved if the court is already well aware of the grounds of the objection from earlier events at the trial. 5 Moore's Federal Practice § 51.04 (2d ed. 1951); 2 Barron and Holtzoff, Federal Practice and Procedure § 1104. To require reiteration in such circumstances would force the parties to engage in a meaningless charade and would needlessly encumber the record.

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*In none of the cases cited by the Court of Appeals in support of its waiver holding is there any indication that the trial judge was informed of the ground of objection in discussions earlier in the trial. Appendix A, *infra*, p. 25.

The instant case illustrates the vice of the rule adopted below. The court and counsel had thoroughly debated the legal problem underlying the objection in question. R. 400-414. The trial judge, who has a deserved reputation for conducting his courtroom with efficiency, would probably have found it as unwelcome as it was unnecessary for petitioner's counsel to have insisted on reiterating a legal position that the court had fully considered and rejected. Even the Court of Appeals acknowledged that it would have been a difficult task "to have caused the [trial] court to change its previously-announced position." Appendix A, *infra*, p. 24.

D. There can be no pretense that the holding below on waiver has importance comparable to great cases such as No. 504 this Term which have a profound effect on our national economy. Nevertheless, the decision below has widespread significance in the conduct of jury cases. Under the ruling of the Court of Appeals, even though the trial judge is fully aware of the ground of objection to an instruction, counsel will find that he has waived his objection unless he reiterates the ground therefor at the time he formally makes the objection. Thus, to avoid waiver, counsel must needlessly encumber the record and risk annoying the trial judge by re-opening an argument which he has already lost. This formalism stands in complete hostility to the spirit of the Federal Rules, and the decision which requires it seems eminently worthy of review in this Court.

II.

The Erroneous Instruction on the Effect of the Earlier Decree Was Prejudicial.

The court below recognized the manifest error of the trial court's instruction that the findings of the prior decree could not be controverted. Appendix A, *infra*, pp. 21-28. The instruction was in open conflict with *Theatre Enterprises v. Paramount*, 346 U. S. 537, 542-543, and *Emich Motors Corp. v. General Motors Corp.*, 181 F. 2d 70, 76 (7th Cir. 1950), reversed on other grounds, 340 U. S. 558, and was flatly inconsistent with the purpose of Congress, see Sen. Rep. No. 698, 63rd Cong., 2d Sess., p. 45; 51 Cong. Rec. p. 16, 276. Since, as we shall show, the error concerned a vital issue and was never corrected, the alternative ground of the court below that the error was not prejudicial cannot be supported.

A. The suggestion of the court below that other instructions cured the defective instruction fails to find any support in the record. The instructions can be searched in vain for any indication that the findings of the earlier decree could be controverted, or for any statement which otherwise corrects the erroneous instruction.* The trial judge, who had also presided in the earlier government litigation, emphasized that he had no intention of permitting petitioner to "go behind the decree" or "retry" the earlier case. R. 407, 415-416, 1243. Because he thought petitioner was "absolutely wrong" in claiming the right to controvert the findings of the earlier decree, he natu-

*Recognizing the difficulty of demonstrating this negative proposition, we invite the Court's attention to the instructions in full which are set forth at R. 1243-1268.

rally made no effort to correct his erroneous instruction. And, he did not inadvertently do so.*

It is true that the instructions required respondent to prove that petitioner unlawfully restrained the Karseal product "Wax Seal". R. 1257. But neither theoretically nor practically did such instructions permit petitioner to challenge the general finding of the earlier decree that the company had restrained trade in waxes and polishes. The instruction making this general finding conclusive gave respondent, in attempting to show a restraint of its product, a factual foundation to which it was not entitled under the law.

B. In the circumstances of this case, the defective instruction prejudiced the substantial rights of petitioner and constituted error which should be corrected by this Court. Cf. 28 U. S. C. § 2111. The earlier decree was at the center of this litigation. The record abounds with references to the effect of the decree, and a substantial portion of the instructions focused on that question. The erroneous instruction went to the heart of the case, and certainly did not relate to mere "formalities or minutiae" of the trial. See *Weiler v. United States*, 323 U. S. 606, 611.

Moreover, at the trial, it appeared without contradiction that petitioner had "approved" or "sponsored" several waxes and polishes through its credit card regula-

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*Assuming that the erroneous instruction had been accompanied by a correct statement as to the effect of the earlier decree (which it was not), the error nonetheless would be ground for reversal "unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless v. United States*, 298 U. S. 342 (Emphasis in original). See also *Paramount F. D. C. v. Applebaum*, 217 F. 2d 101, 125 (5th Cir. 1954) (court must reverse unless later instruction "obliterated" the error); *Puget Sound Nav. Co. v. Nelson*, 59 F. 2d 197, 200 (9th Cir. 1932) (reversal because trial court did not "specifically correct or repudiate" erroneous instruction).

tions and that the sponsored or approved products did not include "Wax Seal". R. 308-310, 1057, 1058. Those facts gave special impact to the court's instruction that petitioner could not challenge the finding of the earlier decree that illegal restraints existed as to waxes and polishes, for obviously such restraints must apply to some or all of the "unsponsored" waxes and polishes. It was an easy step—if indeed it was not inevitable—for the jury to infer from the instruction that respondent's "Wax Seal" had been so restrained. And the prejudice is aggravated because the case was, as the trial judge observed, "a very weak one from the standpoint of the plaintiff.", R. 1290.*

The reasoning of this Court in reversing because of an erroneous instruction in *Bihn v. United States*, 328 U. S. 633, is altogether apt in the present situation:

> "And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence." (P. 639.)

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*Indicative of the seriousness of the trial court's error is the following statement of Representative Webb in urging the House of Representatives to accept the Conference Committee's Report on Section 5.: "A great many lawyers, and some of the best ones in Government service, think that a provision making the judgment conclusive would have rendered the bill unconstitutional . . ." 51 Cong. Rec. p. 16,276.

For similar reasons—the likelihood of confusion on a vital issue in a case that was far from open and shut against petitioner—the erroneous charge was clearly prejudicial here.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. ALSUP,
WARREN M. CHRISTOPHER,
433 South Spring Street,
Los Angeles 13, California,
WILLIAM J. DE MARTINI,
555 South Flower Street,
Los Angeles 17, California,
Attorneys for Petitioner.

Of Counsel:
O'MELVENY & MYERS.

December, 1959.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Richfield Oil Corporation, Appellant, vs. Karseal Corporation, Appellee.

Appeal from the United States District Court Southern District of California, Central Division, No. 15,514, October 13, 1959.

Before: Stephens, and Fee, Circuit Judges, and James M. Carter, District Judge.

Carter, James M., District Judge.

This is an appeal from a judgment entered on a jury verdict in a private treble damage action under the anti-trust laws. It presents two questions, (1) the sufficiency of the evidence to support the verdict and judgment, (2) the correctness of instructions given the jury on the effect of a prior decree in a government anti-trust case.

There was originally presented a third question, the reasonableness of an allowance of $7500.00 attorney's fee based on the trebled judgment of $23,700.00. This point was abandoned by appellant Richfield during the oral arguments on the appeal. In any event we do not consider the allowance of such attorney's fee unreasonable.

This case has been here before. In Karseal Corporation v. Richfield Oil Corporation, (1955) 221 F. 2d 358, this same panel of the court held that the amended complaint stated a cause of action and reversed a district court judgment dismissing the action. Reference is made to that decision for the pertinent allegations of the amended complaint.

This action was based upon a prior decree in the government's civil anti-trust action against the Richfield Oil Corporation, United States v. Richfield Oil Corporation, (S. D. Cal. 1951) 99 Fed. Supp. 280, affirmed per curiam in Richfield Oil Corporation v. United States (1952) 343 U. S. 922, 72 S. Ct. 665, 96 L. Ed. 1334. That case will hereafter be referred to as the Richfield case.

The Richfield case held generally that Richfield's handling of its TBA items, (tires, batteries and accessories) was illegal and in violation of the anti-trust laws because of Richfield requirements by contracts and agreements of exclusive dealing by independent service stations in the TBA items supplied by Richfield. Included within "accessories" under the terms of the Richfield decree, were "automobile waxes and polishes." Karseal's wax and polishes were not expressly named in the Richfield decree. The trial court in the Richfield case concluded and found that the exclusive dealing practices and agreements had "the necessary and intended effect of denying manufacturers and suppliers of . . . automotive accessories, competitive to those manufactured or sponsored by Richfield, access to a substantial number of outlets."[1]

Karseal, claiming that it was within the target area of Richfield's violation of the anti-trust laws and was proximately damaged by Richfield's illegal acts, brought the present action, seeking damages in the sum of $135,000 and praying that the damages be trebled. After the reversal of the dismissal of the action in Karseal v. Richfield (supra), the case was transferred to another judge;

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[1]The quotation is from a conclusion of law. The findings were to the same effect.

(Honorable Leon Yankwich) and was tried to a jury. A verdict in the sum of $7900.00 was returned. The verdict was trebled and judgment entered for $23,700.00, attorney's fees and costs. The district court had jurisdiction of the cause, Sec. 4 of the Clayton Act. 15 U. S. C. A., Sec. 15. This court has jurisdiction of the appeal, 28 U. S. C. A., Secs. 1291, and 1294. The appeal was timely filed.

I.

The Evidence Is Sufficient to Support the Verdict and the Judgment.

Richfield makes dual contentions—

(a) That there was not substantial evidence of an illegal restraint on Karseal's product, and (b) That there was insufficient evidence of damage.

A. Sufficiency of the evidence as to illegal restraint. Flintkote Company v. Lysfjord (9 Cir. 1957) 246 F. 2d 368, cert. denied, 355 U. S. 835, states as follows:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some casual connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' Bigelow v. RKO Radio Pictures, Inc., [327 U. S. 251], supra, at p. 264. The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount*

of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the amount of damage."[2] (p. 392). [Emphasis by the Court]

The prior Richfield decree which was admissible and used in evidence against the appellant, determined that Richfield had violated the anti-trust laws by agreements and understandings, written and oral, directly affecting and unreasonably restraining the course of interstate commerce in TBA automobile accessories, including waxes and polishes. Thus, the Richfield decree itself was prima facie evidence of the restraint of commerce in connection with waxes and polishes. There was substantial evidence that this restraint was not only applied to waxes and polishes generally, but to Karseal's product, "Wax Seal."

Richfield's brief argues the evidence most favorable to its position as if the matter were now before a trial court or jury for decision.

The rule is clear that on appeal from a judgment based upon a jury's verdict, the verdict and judgment based there-

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[2]Other cases to the same effect are:

Wolfe v. National Lead Co., (9 Cir. 1955) 225 F.2d 427, cert. den. 350 U.S. 915;

G. & P. Amusement Co. v. Regent Theatre Co., (N.D. Ohio, 1952) 107 F.Supp. 453, 461; affirmed per curiam (6 Cir. 1954) 216 F.2d 749;

Chiplets, Inc., v. June Diary Products Co., Inc., (D.N.J. 1953) 114 F.Supp. 129, 143-144;

Turner Glass Corporation v. Hartford-Empire Co., (7 Cir. 1949) 173 F.2d 49;

Story Parchment Co. v. Paterson Parchment Paper Co. (1931) 282 U.S. 555, 562, and

Keogh v. Chicago & Northwestern Railway Co., (1922) 260 U.S. 156, 164-165.

on will be sustained if there is substantial evidence in the record in support thereof. We are required to view the evidence in a manner most favorable to the prevailing party, Glasser v. United States, (1942) 315 U. S. 60, 69, 62 S. Ct. 457, 87 L. Ed. 680; Woodward Laboratories v. United States, (9 Cir. 1952) 198 F. 2d 995; Las Vegas Merchant Plumber Assn. v. United States, (9 Cir. 1954) 210 F. 2d 732, 743; Flintkote Co. v. Lysfjord, (supra) p. 375. The prevailing party is entitled to rely upon evidence most favorable to its position.

The testimony offered by Karseal consisted of distributors and salesmen for "Wax Seal," a former Richfield service station operator, a former merchandiser for Richfield, a former TBA man for Richfield and an independent service station operator and others. Without enumerating the testimony in detail, the record shows that distributors for "Wax Seal" were generally unsuccessful in their efforts to sell their product to Richfield TBA men and Richfield service stations; that a Richfield representative told the Richfield service station operator to get Wax Seal out of his window or they would both lose their jobs; that salesmen for "Wax Seal" were told not to come in when Richfield men were around; that "Wax Seal" was occasionally sold in Richfield service stations but kept under the counter and not displayed. A former merchandiser for Richfield testified that he would warn and threaten Richfield dealers who carried non-authorized TBA products. A Richfield merchandiser told a Richfield operator he did not want to see "Wax Seal" in the station.

Thus it was apparent to the jury that independent Richfield service station men were threatened and discouraged from purchasing "Wax Seal" and when occa-

sionally they did purchase, were required to conceal this fact from Richfield and hide the product from view. The jury, looking at the evidence most favorable to Karseal, could conclude that there was a general pattern of exclusion of "Wax Seal" from Richfield service stations, for which Richfield was responsible. As the trial judge stated during discussion with counsel, Richfield "had no right to tell the operators of stations, independent operators and not [Richfield] employees, not to buy other products."

In view of the prima facie effect of the prior anti-trust decree, all that plaintiff was required to do, as far as proving restraint is concerned, was to show that the general restraint applicable to waxes and polishes referred to in the prior decree was actually applied to the Karseal product, "Wax Seal."

There was sufficient evidence to warrant the jury's conclusion as to restraint.

B. The evidence as to damage was sufficient to sustain the verdict and judgment.

(a) *Causal connection between restraint and damage.*

Richfield concedes that once Karseal had shown that the defendant had violated the anti-trust laws, and the further fact that Karseal actually suffered damage to its business or property as a result of such violation, the jury was permitted to make a just and reasonable estimate of the amount of plaintiff's damage. But Richfield insists that there must be first, proof not only of an unreasonable restraint of trade by the defendant, but also a *causal connection* between defendant's act and a loss of anticipated revenue to plaintiff.

Karseal concedes this general statement of the law but asserts that having shown the illegal restraint applied to

its product, it had proved the causal connection between the defendant's wrongful act and the loss of revenue. We agree. It seems patent that the restraint applied would result in some loss of business.

Wolfe v. National Lead Co., (supra) is cited by Richfield for its holding that there was *no proof that the plaintiff's had suffered damage.* Richfield states, "In affirming the court pointed out the important distinction in the quantum of proof required as to the *fact* as distinguished from the *amount* of damages." In the case at hand there was clear causal connection between the alleged restraints applied and damage suffered.

Contrast the factual basis in Monticello Tobacco Co. Inc. v. American Tobacco Co. (2 Cir. 1952) 197 F. 2d 629, with the factual situation here. In Monticello, plaintiff could not prevail because of absence of a showing of *causal connection* between the illegal acts of the defendants and the "jobbers" refusals to handle plaintiffs' products." (p. 633). Here the impact of Richfield's exclusive dealing practices on Karseal was shown by evidence the jury was entitled to and did believe.

(b) *A just and reasonable estimate of damage.*

How then is plaintiff to make a showing which will permit the jury to make a just and reasonable estimate of its damage? The Richfield brief concedes, "It is, of course, true that the quantum of proof required to establish the amount of damage is not and should not be as great as that required to establish the fact of damage. If there is substantial evidence that damage to the plaintiff in fact resulted from wrongful conduct of defendant, it is proper to permit the jury to make a just and reasonable estimate of the amount thereof. . . .".

"A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in anti-trust legislation. Story Parchment Co. v. Paterson, supra, 282 U. S. at page 565, 51 S. Ct. 248." Flintkote Company v. Lysfjord (supra) p. 391. See the general discussion following the above quotation, pp. 391-394.

There is no particular way for a plaintiff, injured by a defendant's violation of the anti-trust laws to show precisely what sales it lost. It certainly cannot prove precisely how many cases of "Wax Seal" were *not sold*.

To assist the jury in making a "just and reasonable estimate of damage," plaintiff offered proof which the jury could believe and consider, that "Wax Seal" sold on the free market, as well or in many instances 3 to 7 times better than a product known as "Mac's," and that "Mac's" was generally a comparable product. Evidence was offered which the jury was entitled to believe that during the period of time involved in this case that Richfield purchased from Mac's Super Gloss Company, 4707 cases of "Mac's" polish. Karseal then contended that the jury could infer that "Wax Seal" outsold "Mac's" 3 to 1, and that therefore had plaintiff not been denied access to the 3000 Richfield service stations during the six years between 1947 and 1953, that an estimate of approximately 14,121 cases of "Wax Seal" would have been sold at Richfield stations. Karseal offered evidence which the jury were entitled to believe, that it was staffed, equipped and able to produce sufficient "Wax Seal" to meet these additional sales. It also offered evidence, which the jury

was entitled to believe, that its net profit per case of "Wax Seal" for the period in question was 57¢ per case.

Had the jury based its verdict on this computation, the result of course would have exceeded the verdict rendered by about $150.00 but the jury could have well taken into account that some "Wax Seal" was actually sold by the Richfield stations.

We do not see much difference between the suggested formula as an assist in arriving at just and reasonable damages, and a chart placed on a blackboard in a personal injury case, where plaintiff's lawyer outlines his computations as to loss of earnings, pain and suffering, and the various other items of damage. The plaintiff is not required to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the anti-trust laws.

Story Parchment Company v. Paterson Parchment Paper Company, (supra) at pp. 562-563, states:

> ". . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount* . . .
>
> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of funda-

mental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making, were otherwise. . . .". [Emphasis added].

Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., (2 Cir. 1949) 176 F. 2d 594 at. 597, states:

". . . Damages in such situation necessarily cannot be assessed with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted.' William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada, 2 Cir. 42 F. 2d 152, 155, certiorari denied Associated Bill Posters of U. S. and Canada v. William H. Rankin Co., 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765. Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy. . . .".[3]

The record showed a restraint in interstate commerce on waxes and polishes which moved in interstate commerce, and particularly a restraint upon "Wax Seal"

[3]See: Eastman Co. v. Southern Photo Co., (1927) 273 U.S. 359; Bigelow v. RKO Pictures, (1946) 327 U.S. 251.

manufactured and sold by Karseal. It is patent that damage would result. The jury could conclude from the evidence that this restraint applied to Karseal was a planned and continuous one, and that it generally affected to a greater or less degree the majority of the 3000 Richfield service stations. The jury had evidence before it which indicated that Karseal out-sold on the free market a comparable product such as "Mac's" and had evidence as to how much of the "Mac's" product was sold in Richfield stations during the time involved.

We equate the just and reasonable estimate of damage to the just and reasonable verdict the jury must render in a personal injury case. Both are Tort actions. In neither can the plaintiff prove to any mathematical certainty, what are the damages in dollars and cents.

Story Parchment Company v. Paterson Parchment Paper Company, (supra) at 565, states:

> ". . . There are many cases in which damages are allowed where the element of uncertainty is at least equal to that in the present case—as, for example, copyright and trade mark cases, cases of unfair competition, and *many cases of personal injury* . . .". [Emphasis added].

Under all the facts in the case the damages must have a reasonable and fair relationship to the type, extent and period of the restraint applied, the number of outlets affected by the restraint and the kind of product, its price and salability, the profit made on sales, and an estimate of the amount of profit lost by reason of the illegal activities of the defendant. There was here proof of such matters.

In Flintkote Co. v. Lysfjord, (supra) plaintiffs were in their first year of working for themselves with no

prior record of the success of their business. In the case at hand there was proof of gross dollars sales of $130,000 in the year ending June 30, 1948 and gross dollars sales of $501,000, $675,000, $799,000, $621,000, and $686,000 in the following years this was *not* proof of business activity prior to the application of the illegal restraints, but *during* the period thereof. We see no reason why a plaintiff who has a substantial volume of sales during a period of illegal restraints would not be damaged by such restraint even if its business started during such period of restraint. The jury might have believed such volume of business indicated no restraint and no damage, but it found to the contrary.

This case is not controlled by Flintkote Co. v. Lysfjord, (supra) or Wolfe v. National Lead Co., (supra). Both are distinguishable. Here there was proof of illegal restraint, obvious causal connection between restraint and damage and proof of sufficient facts to permit the jury to make a just and reasonable *estimate* of damages.

Although Karseal sued for $135,000, its counsel realistically approached the problem and presented to the jury a realistic formula, not as exact proof of its damage but to assist the jury in arriving at a just and reasonable verdict. The instructions on damages, unchallenged, were fair and accurate and presented fully the applicable law on damages in this type of action.[4] Looking at the entire

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[4]The court's instructions on damages were as follows:

I instruct you that the purpose of damage in an anti-trust action of this sort is to put the plaintiff in as good a position as if the illegal acts had never happened.

The law, therefore, allows you, as members of the jury, to arrive at an amount of damages which, in your judgment, under the proof in the case, equals the amount of plaintiff's profit lost as a result of defendant's illegal actions. In this regard, you cannot return a verdict based upon mere speculation, guesswork, or surmise, but the plaintiff, if you find it has suffered injury, is entitled by law to

record, we cannot say that a verdict of $7900 as the damage suffered for restraint applied on a majority of 3000 service stations in a six year period was unjust or unreasonable.

II.

The Instructions on the Use to Be Made by the Jury of the Prior Decree.

After giving the general instructions and explaining to the jury the substance of the prior equity decree, the

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an approximation of what its profits would have been had its rights not been interfered with. Let's re-read that last sentence. In this regard, you cannot return a verdict based upon mere speculation, guesswork, or surmise, but the plaintiff, if you find it has suffered injury, is entitled by law to an approximation of what its profits would have been had its rights not been interfered with.

If you determine that defendant did in fact prevent some of its dealers from purchasing plaintiff's product Wax Seal, and that these dealers would otherwise have purchased plaintiff's product, plaintiff's right to recover is limited to the profits which plaintiff would have made on those sales which plaintiff's distributors would have made but for the action of defendant.

Where the plaintiff had an established business, and the future profits could be shown by past experience, it is permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximated.

If you come to a determination that the plaintiff has been damaged as a result of illegal acts upon the part of the defendant, you may arrive at the amount of such damages as follows:

First: You may consider the evidence regarding the relative amount of auto polish and auto wax sold in the independent service stations which were under written and oral contractual agreements with the Richfield Oil Corporation.

Second: You may consider, in connection with the foregoing, the amount of gross profit which the plaintiff derived from the sale of its product.

Third: You may consider the amount of plaintiff's auto polish and wax sold in service stations under contract with Richfield Oil Corporation in which plaintiff was able to place its product for sale.

The doctrine of proximate cause requires plaintiff to prove that but for oral agreements between defendant and service station

court gave the following instructions which Richfield contends is error:

". . . The ordinary meaning of the phrase 'prima facie evidence' is this: 'Prima facie evidence' of a fact is such evidence as, in the judgment of the law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.

"But in this case the phrase 'prima facie' had a different meaning. This arises from the fact that

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dealers the injury complained of by plaintiff would not have occurred. If plaintiff did not suffer any injury to its business or property or if plaintiff was injured by causes other than acts of the defendant, then such injury was not proximately caused by the acts of the defendent and plaintiff is not entitled to recover from the defendant.

Plaintiff's right to recover is limited to actual damages, the amount of which can be determined with reasonable certainty from the evidence. Plaintiff is not entitled to damages which, as I stated before, are merely speculative, remote or uncertain. I do not mean to say that plaintiff would be precluded from recovery because of the fact that damages may not be exactly computed. Damages are recoverable if you are satisfied from the evidence that they may be reasonably approximated upon the evidence in the case. The question of the amount that plaintiff would be entitled to, if you conclude plaintiff is entitled to a recovery, is entirely and solely your responsibilty, but it must be based upon some evidence in the case as a foundation that furnishes at least a reasonable approximation of damages that plaintiff has sustained, and cannot exceed the amount prayed in the complaint.

In determining damages you may consider the loss, if any, of profit which the plaintiff has suffered when deprived of the right to sell its products through retail service stations under contract to defendant, Richfield Oil Corporation.

In arriving at the extent of such damage suffered by the plaintiff, you may compare the amount of cleaner, auto polish, and wax sold in such service stations by one of the plaintiff's competitors whose products were not denied access to these stations under contract with Richfield Oil Corporation. After having selected a comparable product or products to plaintiff's product, you may ascertain the gross profit which plaintiff would have received from its sale of an equivalent amount of auto cleaner, polish and wax, had it not been denied access to retail stations under contract with the Richfield Oil Corporation. In no case may you award damage which

the section read to your uses the word 'estoppel.' An 'issue of fact' as to which the judgment operates as an 'estoppel' must be an issue as to an 'ultimate fact' such as is required in allegations of fact in good pleadings or in findings of fact in cases tried to the court and must be the ultimate fact without which judgment would lack support in an essential particular.

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exceeds the amount asked for in the plaintiff's complaint, and as to which testimony was given in the record.

However, the mere fact that the plaintiff may or may not have made as much profit as some competitor does not prove or disprove a violation of the antitrust laws. In a competitive system it is natural that some people will be more successful than others.

The question whether any injury to plaintiff's business or property was caused by the allegedly unlawful acts of the defendant is one that you should not consider prior to determining the issues whether there actually were oral agreements between defendant and service station dealers relating to plaintiff's product. If you decide against plaintiff on this question, it would not be necessary to consider the question of injury and it would be your duty to immediately return a verdict in favor of the defendant.

There is evidence that during parts of the period for which plaintiff claims damages plaintiff either had no distributor in some of the areas in which defendant does business or plaintiff's distributor in some areas made only limited efforts to make sales of plaintiff's product. Plaintiff was not injured by any act of defendant if a dealer did not buy plaintiff's product because he was not called on and requested to buy. Accordingly, if you should determine that defendant did in fact have agreements or understandings with its dealers which caused the dealers to refrain from purchasing plaintiff's product, plaintiff can recover only the profit it would have made on those sales which it proves were lost because of defendant's actions.

The fact that the Court has instructed you with respect to damages is not to be taken by you as an indication that the Court believes or does not believe that plaintiff is entitled to recover damages. Such instructions are given to you solely to guide you in arriving at the amount of your verdict only in the event you find from the preponderance of the evidence and instructions of the Court that plaintiff is entitled to recover. If from the evidence and the instructions of the Court you find that plaintiff is not entitled to recover, then of course you are to disregard entirely the instruction which the Court has given you concerning damages.

"When the plaintiff uses the decree to prove that restrictions applied to waxes and polishes, the defendant cannot controvert the general proposition that such restrictions existed. For that matter is what we call res judicata. He is 'estopped' to challenge the general fact. But he may still show that the restrictions were not enforced against the plaintiff's product and that, for this reason, the plaintiff suffered no damage.

"Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence that the defendant in an unreasonable manner prevented access of the plaintiff's product to Richfield stations."

Other instructions on the use of the prior anti-trust decree are included in the footnote,[5] were not objected to by Richfield and were correct statements of law.

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[5]The complete instructions given by the court insofar as the prior antitrust decree was concerned, are as follows: The court has admitted into evidence the decree, findings of fact, and conclusions of law entered in the case of the United States v. Richfield Oil Corporation, Civil Action 6896-Y. These findings and decree were entered in a civil suit instituted by the United States in this District against the defendant, Richfield Oil Corporation, charging a violation of the Anti-Trust Laws, by the defendant therein with respect to various trade practices and contracts used by the defendant in the sale and distribution of automobile accessories, including waxes and polishes. Among other things, it is provided by federal statute that a final decree or judgment obtained by the Federal Government in such a proceeding under the Anti-Trust Laws shall be prima facie evidence against a defendant named in judgment or decree as to all matters respecting which said judgment or decree would be an estoppel as between the Government and such defendant.

Such decree is prima facie evidence in this case as to any question which was put in issue and directly determined against defendant Richfield Oil Corporation.

"Prima facie evidence" means evidence which is sufficient standing alone and on its face, to establish the existence of a given fact or facts, and which, if not rebutted or overcome by other evidence,

(a) Richfield has waived any error by failing to state the grounds for its objection.

Though not raised by Karseal, we are concerned at the outset as to whether there was sufficient compliance with Rule 51, Rules of Civil Procedure, concerning objections

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will remain sufficient to establish such fact or facts throughout the trial. I shall amplify this matter further on in the instructions.

The following matters among others were put in issue and directly determined in the United States v. Richfield Oil Corporation case against defendant and are prima facie evidence against the defendant in this case:

1. That the defendant has violated the Anti-Trust Laws by committing the following acts during the period involved in this case:

(a) By entering into contracts, agreements, and understandings, both written and oral, directly affecting and unreasonably restraining the course of interstate commerce in automobile accessories, including waxes and polishes,

(b) substantially lessening competition, foreclosing competition and attempting to create a monopoly in the sale and distribution of automobile accessories including waxes and polishes, and which

(c) unreasonably restrained and substantially lessened competition in interstate commerce in the six States of the Western Area in the sale and distribution of automobile accessories, including waxes and polishes, and

(d) which had the necessary and intended effect of denying the independent service station operators access to products including waxes and polishes competitive to those handled and sponsored by Richfield and

(e) confined the independent operators to the handling of and dealing in automobile accessories manufactured, including waxes and polishes handled or sponsored by Richfield.

The contracts between Richfield and the various stations related to many products. However, you are concerned only with them insofar as they relate to waxes and polishes.

2. More specifically, the following matters were put in issue and directly determined in the United States v. Richfield Oil Corporation case against defendant:

Richfield has for many years past, and was at the time of the decree, leasing and acquiring title to service station sites and entering into contractual relations with operators of service stations as retail outlets within the western area; that the term "service stations", as used aforesaid, refers to a retail outlet at which petroleum products and or "automotive accessories" manufactured or "sponsored" by Richfield are sold to the motoring public. The term "automotive accessories" as used hereinabove, includes waxes

to instructions given. Rule 51, Rules of Civil Procedure, provides in part:

> "No party may asssign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stat-*

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and polishes and other like items. The word "sponsored," as used hereinafter, refers to those petroleum products and/or "automotive accessories" not manufactured or produced by Richfield but sold and distributed at service stations, the sale and distribution of which are handled or arranged for at service stations by Richfield; that TBA distributors are distributors appointed by Richfield who receive and handle the orders of Richfield service station operators for automobile accessories within a marketing area designated by Richfield; that Richfield has entered into various written and oral agreements and understandings with service station operators.

The evidence in this case relates to three different types of service stations. The first type, including approximately 1350 stations, involved a lease-out or "L-O" type of arrangement. These stations were either owned by Richfield or leased by Richfield from a third person. In either event, the station was then leased by Richfield to an independent operator. The only written agreement between Richfield and L-O station operators was a lease.

The second type, including approximately 280 service stations involved three written agreements or a so-called "3-C" type of arrangement. These stations were either owned or leased from third persons by an independent operator. Under the 3-C arrangement such stations were leased to Richfield and leased back by Richfield to the operator. At the same time, Richfield and the operator entered into a sales contract for petroleum products. The only written agreements between Richfield and 3-C station operators were the two leases and the sales contract.

The third type, including approximately 1370 service stations, involved a so-called "337" arrangement. These stations were either owned or leased from third persons by the station operator. The station operator entered into two agreements with Richfield, one of which provided for the painting of the service station and equipment with Richfield's colors and insignia at Richfield's expense, and the other of which provided for the sale of petroleum products to the operator by Richfield. These were the only written agreements between Richfield and 337 station operators.

You are instructed that the foregoing written agreements standing alone were an entirely lawful and valid method of establishing the business relationship between Richfield and independent station operators distributing its products.

However, oral agreements between Richfield and the operators of the foregoing three types of stations are alleged to have been

ing distinctly the matter to which he objects and *the grounds of his objection . . .*". [Emphasis added].

Counsel were given an opportunity out of the hearing of the jury to make their objections to the instructions given. Only two objections were made and both were of a most sketchy character. Counsel for Richfield stated:

"The only ones to which we have objection Your Honor, are ones with respect to the effect of 'prima

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entered into at substantially the same time as the written agreements and relate to the handling by the operator at his service station of petroleum products and automotive accessories, including waxes and polishes, manufactured or sponsored by Richfield on an exclusive basis.

Beginning in 1944, Richfield inaugurated a new TBA program (TBA meaning tires, batteries, accessories) for distributing its automotive accessories to the L-O, 3-C and 337 dealer service stations. Since 1944, Richfield has sold and distributed automotive accessories, which it purchases from various manufacturers and suppliers, directly to the L-O, 3-C or 337 dealer service stations or through TBA distributors designated by it.

There is evidence that L-O station operators were instructed by Richfield that they were to deal in gasoline, oil and automotive accessories for which the sale to these operators was made or arranged by Richfield. Plaintiff contends that this resulted in agreements that L-O station operators would not deal in wax polish manufactured by plaintiff. Richfield contends that the instructions given by it to L-O station operators were directed primarily to major accessory items such as tires, tubes and batteries and that in actual fact L-O station operators were not prevented from handling and, in fact, did handle plaintiff's wax polish. Plaintiff has the burden of proving that there were oral agreements between Richfield and L-O station operators, which applied to plaintiff's wax polish, and that in fact such oral agreements were carried out with respect to plaintiff's wax polish.

Plaintiff also contends that such instructions were given and resulted in agreements that 3-C and 337 station operators would not deal in plaintiff's polish. Richfield contends that no such instructions were given and that in actual fact 3-C and 337 station operators were free to deal and, in fact, did deal in plaintiff's wax polish. Plaintiff has the burden of proving that there were oral agreements between Richfield and such station operators applicable to plaintiff's wax polish, and that such agreements were in fact carried out with respect to plaintiff's product, to their damage.

It is not enough in a private suit of this character for a plaintiff to show simply that there was a violation of the antitrust laws. It

facie' . . . And of the others, there were two instructions in which the words 'gross profits' were used."

The objections as to the use of the words "gross profits" were considered by the court and the jury were subsequently instructed, with the consent of Richfield, that the

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is essential that plaintiff establish not only the fact of such violation but also that it resulted directly and proximately in injury to its business or property. In this case plaintiff would not be entitled to any recovery unless it had shown to your satisfaction by a preponderance of the evidence that it had actually lost sales of its wax polish by reason of the allegedly unlawful acts of the defendant and/or that it suffered a loss of profits by reason thereof. . . .

Plaintiff alleges in its complaint that defendant prevented its dealers from purchasing the plaintiff's product Wax Seal from plaintiff's enfranchised distributors and their salesmen from July, 1947, when plaintiff was first organized, to January 3, 1953. You are instructed that in no event can plaintiff recover damages for any period subsequent to January 3, 1953.

The law provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent."

This means that there is made available to a private litigant, such as the plaintiff in this case, as *prima facie* evidence, any fact which was at issue and was determined in the Richfield-Government suit with respect to the defendant therein. The proof so offered, plus a showing that the conspiracy had an impact upon the plaintiff's product—Wax Seal—and that it suffered damage as a result, would be sufficient to establish a *prima facie* case. . . .

The ordinary meaning of the phrase "*prima facie* evidence" is this: "*Prima facie* evidence" of a fact is such evidence as, in the judgment of the law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.

But in this case the phrase "*prima facie*" has a different meaning. This arises from the fact that the section read to you uses the word "estoppel."

An "issue of fact" as to which the judgment operates as an "estoppel" must be an issue as to an "ultimate fact" such as is required in allegations of fact in good pleadings or in findings of fact in cases tried to the court and must be the ultimate fact without which judgment would lack support in an essential particular.

court had inadvertently used the word "gross" and the court deleted it and instructed the jury to disregard it. No error is here assigned.

As to the objection to the instruction involving the words "prima facie" and to the use to be made of the

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When the plaintiff uses the decree to prove that restrictions applied to waxes and polishes, the defendant cannot controvert the general proposition that such restrictions existed. For that matter is what we call *res judicata*. He is "estopped" to challenge the general fact. But he may still show that the restrictions were not enforced against the plaintiff's product and that, for this reason, the plaintiff suffered no damage.

Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence that the defendant in an unreasonable manner prevented access of the plaintiff's product to Richfield stations.

This for the reason that there was no finding in the government suit concerning plaintiff's special product "Wax Seal."—let's read that again. This for the reason that there was no special finding in the government suit concerning plaintiff's special product "Wax Seal." You have before you evidence of both the plaintiff and the defendant with respect to the issue whether plaintiff's product was restrained and you should make your own determination on the basis of this evidence whether plaintiff's distributors and their salesmen were actually denied access to Richfield stations. . . .

At the risk of repetition, I reiterate that it is important that you understand the relation of this case to the government case decided in 1948. That case was instituted by the government of the United States. It was not a criminal case. It was a civil case in which the Government alleged that Richfield through tie-in agreements and other methods was guilty of certain practices which were in violation of the antitrust laws.

In that case, I found in substance that certain practices were in violation of the antitrust acts and I issued an injunction prohibiting Richfield from indulging in those acts in the future.

The findings and the decree in that case are before you. The findings are marked Plaintiff's Exhibit I and the Decree is marked Plaintiff's Exhibit I-A, which you may take with you to the jury room along with the other exhibits. In order that you may understand the proper relation of the findings and decree in that case to this one, I state again to you generally that the law provides that any person who has been injured or damaged by any acts in violation of the antitrust laws may bring an action for damages.

The Government's suit was not for damages and nobody was named as plaintiff except the Government of the United States.

prior anti-trust decree, in addition to the objection heretofore quoted which states no ground whatsoever, the following is all that appears in the record. After the court and counsel had agreed on correcting of the words "gross profits" in the instructions, a Richfield attorney stated:

> The object of the Government was to stop certain practices and witnesses were brought to show that those practices were indulged in.
>
> Now, the law provides also, as you were informed at the beginning, that anyone who has been injured by these practices may bring a private suit for damages.
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> In that private suit, the plaintiff, the person who is injured, who has been damaged, brings a suit just as anybody else would bring an action who claims to have been injured by someone else's wrongful act.
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> That is the type of suit we are trying here. The Government of the United States has nothing to do with this lawsuit. This is a private lawsuit between two private parties. However, the law provides that in any such action the parties may, if they want to, use the decree which the Court has entered in the Government case, and that decree shall be *prima facie* evidence of the facts that the court found. I have already explained to you fully the meaning of this phrase.
>
> The decree merely finds that certain acts were done. For instance, with relation to the present lawsuit, the decree did find that certain restrictive practices were indulged in relating to the waxes and polishes but it does not specify what the waxes and polishes were. It merely said "waxes and polishes."
>
> And that is the only purpose for which that decree may be considered by you. The decree in itself, does not make out a case for plaintiff. The plaintiff, Karseal, has to show that that prohibition against waxes and polishes was actually exercised as to its wax and that by reason of the exercise of that policy as to it, it was damaged by losing sales it could otherwise have made.
>
> To sum up: There are three elements to this lawsuit. First, the decree in the government suit. That stands undisputed as to the general practices involved. The second element is the effect, if any, of the restrictions found in the decree on the plaintiff's product. That is subject to proof on the part of both sides.
>
> The third element is what, if any, damage the plaintiff has suffered, that is, the effect of the practice on the plaintiff's product and whether by the enforcement of that practice, it suffered any damage at all. To that element also evidence was offered by both parties.
>
> These are the three elements of the lawsuit. The instructions given state fully the legal principles which govern the determination of these questions. . . .

"The only objection we would have then would be to give our No. 14[6] as to the 'prima facie'." The Court: "I think you are absolutely wrong on that. I stake my entire case on that." Richfield counsel: "We will specifically except to that Your Honor." . . . "Your Honor, just one other point, if we may clear up this objection. We have excepted to the failure to give our instruction No. 14, and we, of course, except to the giving of the instruction on prima facie as given by Your Honor." This certainly is not a compliance with the rule requiring that counsel state not only the matter to which he objects, but state "distinctly . . . the grounds of his objection."

It is true that in an earlier portion of the record long before the conference on instructions and the actual instruction of the jury, there was discussion of this problem,[7] and we think it is fair to say that prior to the time of the giving of the instructions, and at the time provided by statute, after the giving of instructions, for the making of objections thereto, counsel for Richfield knew the court's position and the court knew counsel's position. The court had stated: "The meaning of that word 'prima facie' does not mean that the defendant in a

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[6]Defendant's Instruction No. 14

The decree in the prior government case, to which I have referred, is only *prima facie* evidence with respect to certain matters. *Prima facie* evidence is such as to be sufficient to establish a fact unless it is rebutted by other evidence. If there is other evidence controverting the fact, you are required to make your own determination of that fact by weighing all of the evidence which pertains to it.

[7]No stipulation appears in the record that earlier objections and grounds stated by Richfield, might be incorporated by reference in the record at the time of making objection to the instructions given. This practice has been approved in the Ninth Circuit. See, Las Vegas Merchant Plumbers Assn. v. United States (1954), 210 F. 2d 732, 744-5 and cases cited therein. The trial judge in the case at bar does not follow this practice.

case of this character can come in and controvert that finding in the other case . . .", and again, ". . . this is a thing I have in mind, that they are prima facie to the practice, and that two things are necessary, one to relate the practice to you and then the proof of damage. . . .".[8]

Thus, although the court's position was well known to Richfield's counsel, when the time arrived to make objections, Rule 51 of the Rules of Civil Procedure was not complied with. The purpose of the Rule is to give the court a chance to correct an erroneous instruction on the law. Though viewed realistically, we might hazard a guess that it would have been a difficult task, even by stating distinctly the grounds of the objection, to have caused the court to change its previously announced position. Nevertheless, to preserve the question, on appeal not only

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[8] Other statements showing the position of the trial judge are as follows:

". . . You can put before this jury facts, that this restriction was . . . effective, or partly effective only; as to Karseal, but you cannot say that it was not effective as to anybody . . . .". And again, The Court: "Well, I am giving you the logic by which it would be an absolutely illogical situation, where a jury would determine not whether this plaintiff was damaged by this practice, but whether the practice existed as to all . . . .". "The only thing I would submit to the jury is this: That the plaintiff has to show that this practice was applied to them in this territory, and that they were damaged by it, and then you can show that it wasn't applied as to them and or they weren't damaged, and those are the only three elements I know of in a treble damage suit. . . .".

". . . But you can't go behind the decree and say this was not practiced as to anybody else." "You can say, 'We did not practice it as to Karseal,' but to go behind the decree and offer evidence that you did not practice it as to anyone would be to nullify this act of Congress, which only says it shall be *prima facie*, but defines it by saying the extent that people would be estopped . . . ." And again, The Court: "If your theory is correct, then that section is absolutely meaningless, because you are going to retry before this jury, and I would have to instruct them, that they can find despite my decree not only didn't they exercise this as to this plaintiff, but they didn't exercise it as to anybody. . . .".

should the objection have been made but the grounds thereof should have been distinctly stated.

Husky Refining Co. v. Barnes (9 Cir. 1941) 119 F. 2d 715, 717, 134 ALR 1221;

Shevlin-Hixon Co. v. Smith (9 Cir. 1947) 165 F. 2d 170, 179;

Johnson v. Chesapeake and Ohio RR Co. (7 Cir. 1955) 227 F. 2d 858, 860-862;

Franklin v. Shelton (10 Cir. 1957) 250 F. 2d 92, 98;

See, Palmer v. Hoffman (1943) 318 U. S. 109, 119, Rehear. dgn. 318 U. S. 800.

Accordingly, Richfield's objection to the court's instructions is not available to it on this appeal. But we have nevertheless considered the question as to whether giving the instruction was error.

(b) It was error to so instruct but the error was not prejudicial.

Turning to the correctness of the questioned instructions, Section 5 of the Clayton Act, 15 U. S. C. A., Sec. 16, provides as follows:

"§16. Judgment in favor of Government as evidence; limitation of actions

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, This section

> shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .

When the Clayton Act was originally passed by the House of Representatives it contained language which would make the government decree "conclusive evidence against the defendant of the law and facts determined in the prior equity action." However, the Bill was amended in the Senate substituting the words, "prima facie" for the word "conclusive." As so amended the Bill passed the Senate, was agreed to by the House conferees and became law. Report of the Senate Judiciary Committee set forth in the margin[9] pointed out that considerations of public

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[9]In section 6 there are two paragraphs as it came from the House. The first paragraph provides in substance that whenever in any suit in equity hereafter instituted by the United States a final decree is rendered against a defendant for violating any of the antitrust laws said decree shall, to the full extent to which such decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law, in favor of any other party in any action brought under the provisions of any of the antitrust laws. It is proposed to amend this by making the decree in favor of the United States *prima facie* evidence against the same defendant in any suit brought by any other party under the antitrust laws as to all matters respecting which said decree would be an estoppel as between the parties thereto. The material difference between the House provision and the Senate amendment is of course whether the decree in favor of the Government shall be *prima facie* evidence against the same defendant in a subsequent suit by another party or be conclusive against such defendant. The Committee think there are considerations of public policy which favor the House provision of conclusiveness, but in the state of the decisions of the Supreme Court of the United States in kindred cases they believe the law should go no further than to make the decree *prima facie* evidence. As a type of the opinions of the Supreme Court which have been examined by the committee in analogous cases attention is invited to the following:

> "Without going at length into the discussion of a subject so often considered, we think the conclusion reached by the courts generally may be stated as follows: It is competent for the legislature to declare that a tax deed shall be *prima facie* evi-

policy might favor the House proposition of conclusiveness, but that serious doubts existed as to the constitutionality of such a proposition, in that it would deprive one of his property without due process of law.

The reason for the concurrence by the House with the Senate amendment was expressly to the same effect.[10]

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dence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land.

"Mr. Cooley sums up his examination of the cases on this subject in the following statement: 'That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a plain violation of the great principle of Magna Charta, which has been incorporated in our bill of rights, and, if successful, would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible jurisdictional facts which would make out title. But the legislature might doubtless make the deed conclusive evidence of * * * everything except the essentials.' Cooley on Taxation, 521, 5th ed., 1880. (Marx v. Hanthorn, 148 U. S. 183.)" (Senate Report No. 698, 63rd Cong., 2d Sess. at p. 45).

[10]Now let us pass to section 6, which refers to the "conclusiveness" or "*prima facie*" effect of judgments in Government suits against the trusts. As the House passed the section we made such judgment "conclusive". The Senate struck out the word "conclusive" and inserted "*prima facie*." Personally, I think the Senate did the best thing by making it "*prima facie*." I doubt whether the courts would have held that the "conclusive" provision was constitutional. On the other hand, I believe that the "*prima facie*" effect of the judgment is as powerful before a jury as if you had said that it was "conclusive." A great many lawyers, and some of the best ones in the Government service, think that a provision making the judgment conclusive would have rendered the bill unconstitutional, but with the "*prima facie*" provision it is constitutional and will be as effective as if we had left it "conclusive." (51 Cong. Rec., Part 16, p. 16,276.)

In Emich Motors Corporation v. General Motors Corporation, (7 Cir. 1950) 181 F. 2d 70, reversed on other grounds, 340 U. S. 558, the Seventh Circuit quoted the following instruction given to the jury with approval:

> "Being prima facie evidence the judgment is not conclusive in this case. It is merely sufficient evidence of a violation by these defendants of the anti-trust laws to put these defendants to their proof . . .". (p. 76).

In the same case in the Supreme Court, Emich Motors Corporation v. General Motors Corporation [1951] 340 U. S. 558, the court said, (pp. 568-569):

> ". . . By its terms, however, §5 makes a prior final judgment or decree in favor of the United States available to a private suitor as prima facie evidence of 'all matters respecting which' the judgment 'would be an estoppel' between the defendants and the United States. We think that Congress intended to confer, *subject only to a defendant's enjoyment of its day in court against a new party*, as large an advantage as the estoppel doctrine would afford had the Government brought suit.
>
> "The evidentiary use which may be made under §5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. * * * Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish *prima facie* all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." [Emphasis added.]

It is this portion of the Supreme Court's decision which the trial court apparently relied upon, together with The-

atre Enterprises Inc. v. Paramount Film Distributing Corp. (1954) 346 U. S. 537. But we think the judge's reliance on these cases was misplaced. The language relied upon from the Theatre Enterprise case (*supra*), as shown in the record of our case during prior discussion between the court and counsel, was the following:

> ". . . These instructions, petitioner argues, were 'so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it' by § 5.
>
> "We cannot agree. The trial judge instructed in effect, that the *Paramount* decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the hub of plaintiff's claim. The *Paramount* case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948; but the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed, the relevancy of *Paramount* to the instant case is slight. . . ." (pp. 543-4).

However, the court in the Theater Enterprises case (*supra*) had earlier stated:

> ". . . Petitioner next contends that the trial judge, when instructing the jury, failed to give sufficient weight to the *Paramount* decrees. The decrees were admitted in evidence pursuant to §5 of the Clayton Act, which provides that a final judg-

ment or decree rendered against a defendant in an equity suit brought by the United States under the anti-trust laws 'shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .'. Exercising his discretion to choose the precise manner of explaining a decree to the jury, the trial judge instructed that:

". . . [T]hese same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable.' . . ." (p. 542-3).

We think the holding of the Theatre Enterprises case is directly contrary to the position of the trial judge.

Richfield argues, we think correctly, as follows:

> ". . . If Section 5 of the Clayton Act made the government decree conclusive evidence rather than merely *prima facie* evidence which the defendant could rebut, this obviously would deprive a defendant in a treble damage action of its right to a jury trial of the issue of the violation of the law."

The other reported cases confirm our view that the instruction of the trial court was erroneous. In Harrison v. Paramount Pictures (E. D. Pa. 1953) 115 F. Supp. 312-315, affirmed by the Third Circuit on the opinion below, 211 F. 2d 405, the court said:

> "The [Emich] case decided what matters the prima facie case covered, but there is nothing in the opinion to support the plaintiff's argument that the presumptions arising from the decree in favor of the United States are conclusive and incontrovertible. *It is hardly necessary to say that the references to estoppel in Section 5 of the Clayton Act merely define the area which the prima facie case covers.*" (p. 315). [Emphasis added.]

To the same effect is Suckerman v. E. I. du Pont de Nemours Company (S. D. N. Y. 1953) 1952-53 C C H Trade cases, Sec. 68-346, otherwise unreported:

> "Plaintiff in his moving papers urges that the judgment in the antitrust suit brought by the United States is conclusive as against defendant and that the misuse of patents by defendant invalidates its defense of ownership . . .

> "The purpose of Section 15 was to lighten the burden of proof of a private litigant and to facilitate the presentation of the necessarily extensive proof of such a conspiracy. However, the prior judgment is not to be accepted as conclusive proof of the conspiracy found; it is merely prima facie evidence against which defendant is entitled to his day in court for the purpose of rebuttal. . . . . ".

In Eagle Lion Studios v. Loew's Inc. (11-24-58) 358 U. S. 100, the Supreme Court had granted certiorari on the question, "Were findings in the government's prior antitrust suit prima facie evidence under Section 5 of the Clayton Act of conspiracy against the plaintiffs, "but the Supreme Court affirmed the lower court (248 F. 2d 438), *per curiam* by an evenly divided court. The Circuit had affirmed (one judge dissenting) the dismissal of the case in the trial court for failure of proof of conspiracy.

The trial court had examined the prior Paramount decree and its findings and conclusions, and had concluded that "while the findings may perhaps constitute evidence . . . that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the Paramount case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the present case." (248 F. 2d at 443). On appeal the appellants characterized this as a "niggardly construction" of the Paramount judgment. (p. 443).

The Circuit Court said (p. 444):

". . . In determining, under that section, [Sec. 5, Clayton Act] the effect of a judgment in a prior anti-trust suit it is not our function to consider inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment. Under section 5 a judgment in a prior suit is *prima facie evidence* 'as to all matters respecting which said judgment * * * would be an *estoppel as between the parties thereto* * * *'."

[Emphasis added in opinion.]

The court quoted from its decision in Monticello Tobacco Co. v. American Tobacco Co. (*supra*), 197 F. 2d 629, 631-632:

"* * * whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proved by direct evidence. . . ." (citing cases).

The court concluded (pp. 444-5):

". . . Applying these principles of the Paramount judgment we conclude that the issue here in suit was not 'distinctly determined' in the Paramount litigation . . . In short, we must look elsewhere if we are to find any evidence of the conspiracy that the plaintiffs here charge."

The Eagle Lion case (*supra*) is the last decision by the Supreme Court touching the effect of Sec. 5 of the Clayton Act, but the *per curiam* affirmance by an evenly divided court affords little help.

We have been able to find no authority supporting the instruction of the trial court on Karseal's position on

this problem. We think the fallacy would be well demonstrated by the following example. Suppose that the prior anti-trust decree had not only determined generally the restraint against waxes and polishes but also had determined particularly a restraint against Karseal's "Wax Seal." Applying the trial court's logic, this would have required him to have instructed that the prior anti-trust decree was conclusive on the question of restraint against the plaintiff Karseal and its product, and the only question then left open to the jury would have been the question of Karseal's damage. Certainly this is not the law.

However, we cannot say that the error was prejudicial. Inimediately following the challenged instruction, the court said:

> "Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence that the defendant in an unreasonable manner prevented access of the plaintiff's product to Richfield stations. This for the reason that there was no special finding in the government's suit concerning plaintiff's special product 'Wax Seal.' You have before you evidence of both the plaintiff and the defendant with respect to the issue, whether plaintiff's product was restrained. You should make your own determination on the basis of this evidence whether plaintiff's distributors and their salesmen were actually denied access to Richfield's stations."

Various other instructions given by the court correctly stated the law. They are quoted in the margin.[11]

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[11] See note 3 (*supra*).

In summing up the court said: "The decree in itself does not make out a case for plaintiff. The plaintiff, Karseal, has to show that the prohibition against waxes and polishes was actually exercised as to its wax and that by reason of the exercise of that policy as to it, it was damaged by losing sales it could otherwise have made."

Thus, under the instructions given, Karseal was still required to prove that an unlawful restraint was applied by Richfield to its product "Wax Seal," that it was damaged thereby, and the extent of its damage.

It cannot be argued that the jury was prejudiced by being informed of the prior decree, for it was clearly admissible. Even had the questioned instruction not been given, the jury would have had before it the prior decree and would have known that Richfield had been found to have violated the anti-trust laws by its exclusive dealing practices in TBA items, including wax and polishes.

There was left to the jury by the court's instructions all the proper elements of a treble damage case, (1) were illegal procedures applied to plaintiff and its product, (2) was the plaintiff damaged, (3) the extent and amount of such damage.

We see the problem the trial court was approaching. In a private treble damage action it is necessary to prove, (1) *public injury, i.e.*, a violation of the anti-trust laws, and (2) *private injury*. In a government anti-trust case only proof of the public injury is required.

As stated in Emich Motors Corp. v. General Motors Corp. (7 Cir. 1950) 181 F. 2d 70, 75, reversed on other grounds, 340 U.S. 558,

> "And we think the judgment is available at least for the limited purpose of establishing that there had

> been *a violation of public rights in the absence of which plaintiff would have no cause of action* under the statute, and from which violation they assert their injury stemmed." [Emphasis added.]

The trial court was of the view that the public injury was conclusively established by the prior anti-trust decree. But the trial court required Karseal to prove the impact of Richfield's actions on it and its product "Wax Seal." When this was proved, then public injury was proved since Karseal was a member of that illusive body, the "public." The purpose of the anti-trust laws is to protect the interstate market from illegal restraints. If such restraints are applied to one person in the interstate market, then free competition is hurt and damaged.[12]

When Richfield hurt and damaged Karseal it hurt and damaged free competition, the touchstone of the anti-trust laws. This was what the trial judge's instructions required Karseal to prove.

We therefore conclude that appellant Richfield, for failure to compiy with Rule 51 of the Rules of Civil Procedure, does not have available to it on this appeal, the right to challenge the instruction as given by the court and alternately, that although the instruction com-

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[12]This opinion was prepared prior to the decision in Klor's, Inc. v. Broadway-Hale Stores, 359 U. S. 207. There the court said that a combination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrieve by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. . . .". (p. 213).

plained of was erroneous in view of other instructions by the court and the scope of the issues left to the jury, the error was not prejudicial.

The judgment of the district court is affirmed:

Judge Fee did not participate in this decision.

(Endorsed:) Opinion. Filed Oct. 13, 1959.

PAUL P. O'BRIEN, *Clerk.*

Judgment

No. 15,514

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: Oct. 13, 1959.

PAUL P. O'BRIEN, *Clerk.*